LIAU MUI MUI

v.

DR R VENKAT KRISHNAN

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NOOR AHMAD J
[CIVIL SUIT NO: P378 OF 1982]
25 SEPTEMBER 1998

TORT: *Negligence - Medical negligence - Obstetrician and gynaecologist - Failure to realise perforation of uterus during procedure - Whether negligent*

TORT: *Vicarious liability - Locum doctor - Operation performed on patient of clinic - Terms of employment - Clinic issued with hospital licence - Whether doctrine of non-delegable duty applicable - Effect of doctrine*

The defendant, an obstetrician and gynaecologist, was the proprietor of Klinik Wanita-Wanita ('the clinic') which held a hospital licence. On 18 April 1980, Dr Ramachandran, the locum doctor employed at the clinic ('SD2'), performed a dilation and curettage ('D&C') procedure on the plaintiff, which resulted in a perforation of the uterus and severe injuries to her rectum and small intestines.

The plaintiff alleged that she had sought treatment at the clinic for stomach pains and bleeding, and the defendant had advised her to have the D&C carried out. The defence however, contended that the plaintiff had gone to the clinic for the purpose of illegally terminating her pregnancy as there were no medical reasons to do so.

The issues before the court were: (i) whether the plaintiff's claim was founded on illegality by virtue of s. 312 of the Penal Code; (ii) whether SD2 had been negligent; (iii) whether the defendant was liable for SD2's alleged negligence; and (iv) the quantum of damages.

Held:

[1] There was demonstrable falsehood in the evidence of SD2 and another defence witness in relation to the purpose of the D&C and the clinical notes produced by the defence. The evidence first suggested the notes were recorded at the clinic soon after the D&C; however, SD2 later stated that they had been recorded some three months later to protect his position when it became apparent that the plaintiff was instituting legal proceedings.

[2] There was no reliable documentary evidence to show that the plaintiff had sought to illegally terminate her pregnancy. The defendant had failed to discharge the burden of proving beyond reasonable doubt the elements of s. 312 of the Penal Code, ie, that the voluntary miscarriage was not caused in good faith for the purpose of saving the life of the plaintiff.

[3] As SD2's evidence was tainted with falsehood, corroboration of his assertion that he took adequate precaution before and during the D&C, was required. However, no corroboration was available and his assertion had to be rejected.

[4] SD2 admitted that he must have used a little more force in carrying out the procedure. The nature of the injuries showed that they could not have been caused by a single stroke but by the repeated acts of a person who was not aware that he had perforated the uterus.

[5] The medical literature on the subject states, *inter alia*, that while damage to the uterus and surrounding structures is not negligence *per se*, failure to detect or suspect it, is. On a balance of probabilities, SD2 had failed to use due care and skill when performing the D&C on the plaintiff.

[6] SD2 was employed on a full-time basis and was authorised to perform D&C on patients such as the plaintiff, using the premises and instruments. Payments were made to the clinic and he did not share in the clinic's profits. The defendant was responsible for everything in the clinic. On these facts, SD2 was the defendant's agent.

[7] As the clinic had a hospital licence, it should be regarded as a hospital and the doctrine of non-delegable duty applied. As such, it was not necessary to decide whether SD2 was a servant or independent contractor, as the clinic would be legally responsible for the negligence of SD2.

[8] The plaintiff underwent two operations and required several hospitalisations for her injuries. She also sustained three scars and continued to experience, *inter alia*, severe symptoms of colic, nausea and diarrhoea. The court therefore awarded RM40,000 for general damages and allowed the claim for RM1,452 in special damages.

[Claim allowed with costs on the Subordinate Courts' scale.]

Cases referred to:
Bovenzi v. Kettering Health Authority [1991] 2 Med LR 293 ***(refd)***
Cassidy v. Ministry of Health [1951] 1 All ER 574 ***(foll)***
De Silva v. PP [1964] 30 MLJ 81 ***(refd)***
Khoo Chye Hin v. PP [1961] MLJ 105 ***(refd)***
Mahalingam Varathan v. Chan Chee Tuck [1987] 2 MLJ 20 ***(refd)***
Puspawangi Hassan v. Chou Hau [1993] 1 CLJ 289 ***(refd)***
Roe v. Minister of Health [1954] 2 QB 66 ***(foll)***
Rothwell v. Raes [1988] 54 DLR 193 ***(not foll)***

Legislation referred to:
Penal Code, s. 312

For the plaintiff - Sharmini Navaratnam; M/s Siva Dharma & Assoc
For the defendant - PS Ranjan (Manmohan S Dhillon with him); M/s PS Ranjan & Co

Reported by Anne Khoo

JUDGMENT

Mohd Noor Ahmad J:

The defendant is and was an obstetrician and gynaecologist. He is the proprietor of Klinik Wanita-Wanita which had been issued with a hospital licence. On 18 April 1980, Dr. Ramachandran (SD2), the locum at the defendant's clinic performed a d&c procedure on the plaintiff. The procedure resulted in the perforation of the uterus, multiple perforations in the rectum and multiple lacerations in the small intestines. At the time of the incident the defendant was away on leave overseas.

The issues for my consideration are -

(1) Whether the plaintiff's claim is founded on an illegality on the ground that she had undergone an illegal termination of her pregnancy?

(2) Whether the locum (SD2) who performed d&c procedure on the plaintiff was negligent?

(3) Whether the defendant is liable for the alleged negligence of the locum?

(4) What is the quantum of damages?

My views are as follows -

Re issue (1)

(1) The plaintiff (SP1) testified that she went to the clinic because she had bleeding and stomach pain to see the defendant but was told that the defendant was busy upstairs. She was asked by the nurse to undergo a pregnancy test and to return to the clinic on the next day for the d&c procedure. She had the same symptoms of bleeding and stomach pain the previous year for which she saw the defendant who advised her to have a d&c done which was performed by the defendant because it was necessary to do so as she was suffering from bleeding and stomach pain.

(2) The defence contended that the plaintiff went to the defendant's clinic on the second occasion for the d&c to be performed in order to terminate her pregnancy with no medical reason for it. SD2 at first stated that the d&c was performed because she had complained of bleeding from the vagina. There was bleeding and blood clots in the vaginal wall. He found that the case was an incomplete abortion where the product of conception had partially come out. However, upon recalled, he disagreed to what he had testified earlier and stated that the urine test was positive and the plaintiff requested for termination of the pregnancy. SD3 stated that the plaintiff came to the clinic and asked for an abortion. SD4 also stated the same but could not remember whether the plaintiff spoke to her or to SD3. With regard to the notes on p. 54 of Ikatan B, at first SD2's evidence seems to suggest that they were recorded at the clinic soon after the d&c was done and this was confirmed by SD3. However, when recalled, SD2 stated that they were recorded some three months later when Irene and Philomina (the defendant's staff) came to his house in Segamant in order to protect himself as the plaintiff was taking up a civil suit.

(3) It is manifestly evident that there had been demonstrable falsehood in SD2's and SD3's evidence in respect the purpose of the d&c and the notes. SD4's evidence with regard to the plaintiff's request for an abortion as alleged is unreliable. Therefore, I view their evidence with suspicion and treat them with caution. (see *De Silva v. PP* [1964] 30 MLJ 81 and *Khoo Chye Hin v. PP* [1961] MLJ 105). The contemporaneous documents, that is to say, the alleged referral note, the operative note and the piece of paper on which SD2's note was recorded are not available. The hospital records on the plaintiff are sketchy and incomplete. Hence, the notes on pp. 2 and 9 of Ikatan B are not reliable. Therefore, no conclusive finding can be made on the defence's contention that the plaintiff went to the clinic to have the d&c done in order to terminate her pregnancy without any medical reason.

(4) The defence intended to frustrate the plaintiff's claim by the allegation of an illegality by reason of criminality under the then s. 312 of the Penal Code. It is trite that, for the purpose, the proof must be beyond reasonable doubt. In this suit the burden of proof with regard to the allegation is on the defendant to show that the voluntary miscarriage was not caused in good faith for the purpose of saving the life of the plaintiff. By reason of the unsatisfactory nature of the evidence as highlighted above, I conclude that the defendant had failed to discharge that burden. Therefore, the answer to this issue is in the negative.

Re issue (2)

(1) SD2 testified that during the d&c procedure while scraping with the curette he felt there was a product of conception very adherent to the uterus and while trying to scrape it he perforated the uterus. He admitted that he must have used a little bit more force in trying to scrape the adherent portion. Further, when he met with the adherent product he tried to slowly bring it out. He had to do it 2-3 times. He did not know the length of the curette that went beyond the uterine wall and while scraping the adherent part he noticed that the length of the curette was longer. He removed the curette because he thought that an accident might have taken place and that he might have perforated the uterus and there was the possibility of perforation of the intestines and the rectum as well. He agreed that the injuries might have taken place as described in exh. P8 at p. 343 C, D and E. SP2 opined that the perforation of the uterus was caused by a sharp instrument. From the nature of the injuries the injuries could not have been caused by a single stroke. If it was a single stroke the injuries could be maximum 1 or 2. This indicates that the person who was doing it was not aware of what was going on inside without realising that he had perforated the uterus but kept going on with the procedure and when he realised it was a bit too late and the extensive injuries to the small intestines and the rectum had been caused. Further, SP2 stated that the injuries were not common injuries after a perforation of the uterus and that was the only case that she had come across in her career of over 25 years as a surgeon. SP2's view was supported by SD5, who confirmed that the injuries to the rectum and the small intestines could have been caused by a sharp instrument following the perforation of the uterus. Further, he stated that it was possible to injure the surrounding structures if extra force was used. Looking at the injuries to the small intestines and the rectum it was possible that the instrument had perforated the uterus and repeated strokes could have caused the other injuries and it was possible that SD2 would not have realised it. SD5 also confirmed that the injuries were major and he himself had only known of one such case

following perforation of the uterus during a d&c procedure in his 30 odd years as a surgeon. The defendant (SD1) agreed that the injuries could have been caused by SD2 who had perforated the uterus without realising and continuing with the procedure. SD6 agreed that if perforation had occurred and the scraping was continued injuries could occur to fixed structures like the rectum and the small bowels if they were relatively fixed perhaps due to adhesions, and if the small bowels were free and mobile injuries to them might not occur or might occur. He further stated that whether the injuries to the small bowels and the rectum occurred before SD2 recognised the perforation would depend on when the perforation had occurred. He agreed that it was possible that the perforation to the uterus had occurred earlier prior to SD2's realisation that perforation had occurred and that if the metal curette was used to scrap such injuries would not have occurred if SD2 stopped the procedure after recognising that the perforation of the uterus had occurred.

(2) SD2 asserted that he took adequate precautions before and during the d&c procedure. However, as his evidence is tainted with falsehood I need to look for corroboration elsewhere on this point. I can find none because as I have said earlier the contemporary documents were not available and that the notes on p. 54 of Ikatan B were written some three months later from memory were not reliable. Therefore, his assertion is merely bare.

(3) No doubt that the site of the operation was not visible to SD2 and the medical literatures on the subject produced state that (i) during the course of a surgical procedure, surrounding structures that are not usually part of the field of that particular operation may be injured, (ii) damage to the uterus and sometimes to neighboring structures during instrumentation at termination is not negligent *per se*; failure to detect or suspect it, is (iii) that it is often difficult to be certain when the perforation occurred and indeed most perforations maybe neither suspected nor detected and (iv) perforation of the uterus even in experienced hands is a common complication, I am satisfied on the balance of probabilities that SD2 had failed to use due care and skill when he performed the d&c procedure on the plaintiff. This is because I am convinced that he did not realise he had perforated the uterine wall and continued scraping with the sharp end of the curette by using a little more force with repeated strokes causing multiple injuries to the plaintiff and when he realised it was too late. The injuries suffered by the plaintiff following a d&c procedure are rare. This fact has also influenced me to arrive at such conclusion (see *Bovenzi v. Kettering Health Authority* [1991] 2 Med LR 293). Therefore, the answer to this issue is 'yes'.

Re issue (3)

The evidence revealed that as a locum on full time basis SD2 was authorised to do the d&c procedure on patients, except the defendant's personal patient, and the plaintiff was not the defendant's personal patient. The patients made payment to the clinic and SD2 was paid either RM200 or RM150 per day by the defendant without any share of the profits. SD2 was authorised to use the clinic and the instruments thereat for the procedure. The staff had been instructed by the defendant to take instructions from SD2. The defendant was responsible for everything in the clinic and would be responsible for the patient if the outpatient card was issued for the patient, of whom the plaintiff was one. On these facts I am satisfied that SD2 was the defendant's agent. Further, as the clinic had been issued with a hospital licence, to my mind, it should be regarded as a hospital. That being the case the doctrine of non-delegable duty applies. Under the doctrine it is not necessary to decide whether or not the engagement of SD2 as a locum would fall within the category of servant or independent contractor. Whatever is the conclusion on whether SD2 is an independent contractor or servant or agent, the clinic would be legally responsible to the plaintiff for the injuries caused to her if negligence is proved by the plaintiff against SD2. I am inclined to accept the views of Denning LJ in *Cassidy v. Ministry Of Health* [1951] 1 All ER 574 and *Roe v. Minister of Health* [1954] 2 QB 66. In the latter, Denning LJ stated, *inter alia*:

> The hospital authorities are responsible for the whole of their staff, not only for the nurses and doctors but also for anesthetists and surgeons. It does not matter whether they are permanent or temporary, resident or visiting, whole time or part time. The hospital authorities are responsible for all of them. The reason is because even if they are not servants, they are agents of the hospital to give the treatment. The only exception is the case of consultants or anesthetist selected and employed by the patient himself.

In this case it is evident that the plaintiff by herself did not select and employ SD2 to treat her. The Canadian case of *Rothwell v. Raes* [1988] 54 DLR 193 is not followed because in that case the locum was employed by a family physician and not a specialist and no hospital licence was issued to the family physician, which is not the case here. Most importantly in that case the locum was free to see patients of her own and she was entitled to receive 50% of the gross earnings she generated during the time she worked there. Therefore, the answer to this issue is in the positive.

Re issue (4)

General Damages

The initial injuries suffered by the plaintiff are:

a) 1 cm tear in the fundus of the uterus over the left side.

b) Multiple perforations four in number in the rectum each about 1 cm in diameter.

c) Multiple lacerations three in the terminal ileum each tear measuring 2 cm x 3 cm going through entire wall of ileum.

d) The length of the small bowel involved was about 10 inches and there was one foot shortening of the small intestines.

e) Minimal bleeding from the anterior aspect of uterus.

f) Fair amount of faecal contamination in the peritoneum and fibrinous matter over the small bowel.

g) The ileum and the mesentery was oedematous and thickened.

The operation done on the plaintiff on 19 April 1980 included:

a) gut resection of ileum and to end anastomosis.

b) rectal perforations repaired.

c) transverse colostomy (loop colostomy) done.

d) drain inserted into recto uterine pouch.

e) the uterine perforation was repaired.

The plaintiff underwent a second operation for closure of colostomy on 17 June 1980 and was discharged on 21 June 1980. After the two initial operations on the plaintiff, the plaintiff was readmitted twice in the General Hospital. The first readmission was on 22 November 1980 wherein he was hospitalised for seven days and diagnosed to have acute intestinal obstruction due to adhesions. The second re-admission was on 13 May 1980 wherein she was hospitalised for ten days and a diagnosis of adhesion colic was made. The initial injuries to the plaintiff has also resulted in three scars, namely a colostomy scar, a subumbilical laparatomy scar and a small scar in the left illiac fossa represented by the previous drain site wound. Apart from the hospitalisation she was seen by SP2 as an outpatient. Sometimes the plaintiff came with abdominal pain,

sometimes with complaints of diarrhoea, mostly related to abdominal pain with feeling of bloated stomach and passing of loose stools. The plaintiff kept on going back to see SP2 and sometimes said she felt like vomiting. For the first ten years the plaintiff went back to see SP2 quite frequently. SP2 stated that adhesions can recur at any time even 20 years after the operation. This is supported by exh. P20 at D on p. 148 which states that adhesions may present as obstruction 30 or more years after abdominal surgery. The plaintiff had complained of various symptoms of adhesion colic such as bloated stomach, feeling like vomiting and diarrhoea. The plaintiff stated that for the first ten years the symptoms were very severe and she is still not normal, after the operation she lost 10 lbs in weight, felt weak and could not do heavy work, after the operation she felt sad and pain all over her body, she could not leave the house because of the colostomy bag and could not wear fashionable clothes, and she also had problems with her sex life. In *Puspawangi bte Hassan v. Chou Hau* [1993] Mallal's Digest para. 734 a sum of RM44,000 was awarded in 1992 for intra abdominal injury. In the case of *Mahalingam a/l Varathan v. Chan Chee Tuck* [1987] 2 MLJ p. 20 a sum of RM30,000 was awarded on 29 December 1986 for intra abdominal injury.

On the evidence, to my mind, an award of RM40,000 under this head is adequate.

Special damages

I am satisfied on the balance of probabilities that the items claimed under this head as itemised on p. 18 of Ikatan A have been proved by the plaintiff and they are reasonable.

Therefore, judgment is entered against the defendant as follows:

(1) General damages – RM40,000.

(2) Special damages – RM1,452.

(3) Interest at 8% per annum on general damages from the date of the filing until settlement and 4% per annum on special damages from 18 April 1980 until judgment and 8% per annum until settlement.

(4) Costs to the plaintiff based on the Subordinate Courts' scale.